91-1392 (2)

Supreme Court, U.S.
FILED
MAR 24 1992
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

HOMEBUILDERS ASSOCIATION OF BUCKS/
MONTGOMERY COUNTIES, INC.
AND
TRAPPE MEADOWS, INC.
Petitioners

v.

BOROUGH OF TRAPPE
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT

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JURISDICTIONAL STATEMENT

The petitioner, Homebuilders Association of Bucks/Montgomery Counties, Inc., has not applied for any building permits in the Borough of Trappe, nor has that corporation paid any of the fees in question. The District Court dismissed the claims presented by Homebuilders Association of Bucks/Montgomery Counties, Inc. for lack of standing. The Court of Appeals affirmed. That issue has not been preserved in this petition for writ of certiorari; and thus, the dismissal of the claims of Homebuilders Association of Bucks/Montgomery Counties, Inc. for lack of standing, is res judicata. Accordingly, it has no standing to present the purported taking claims under the Fifth Amendment or the substantive due process claims under the

Fourteenth Amendment to this Court.

Petitioner seeks to have this Court review the standard for determining whether a legislative regulatory enactment violates substantive due process. The issue as to whether some other standard than a rational basis should have been used by the district court was neither argued nor briefed before the Court of Appeals. Accordingly, it should not be considered on certiorari. *Miree v. DeKalb County*, 433 U.S. 25, 97 S.Ct. 2490, 53 L.Ed.2d 557 (1977).

STATEMENT OF THE CASE

On October 28, 1987, L & W Associates presented the Trappe Meadow subdivision and development plan for review before the Borough of Trappe, Pennsylvania. The plan provided for the subdivision of a parcel of land into seventy-one (71) single family

residential building lots (R.799a-800a, 803a). On November 13, 1987, L & W Associates assigned their rights in the agreement for the sale of the Trappe Meadow tract to Louis Besa, who in turn assigned the agreement to Trappe Meadow partnership (R.190a-202a). On July 10, 1989, Trappe Meadow, Inc. was formed and the partnership assigned the agreement to the corporation (R.203a).

Trappe Meadow, Inc. purchased the seventy-one developable lots at $45,000 per lot for a total consideration of $3.2 million for land costs alone, without any public improvements (R.804a-806a). The developer estimated that the cost for the development of the public improvements, including roads, sewer system, water supply system and storm drainage systems within the development would cost approximately $1.5 million more (R.803a). Single family residences

to be constructed on the seventy-one lots would have a mean sale price of $269,000 each. For each house, the developer would pay a building permit fee of $1,000 on $100,000 construction costs, a tapping in fee to the Collegeville-Trappe Joint Water System of $700, and a capital contribution to the Collegeville-Trappe Joint Water System of $1,500 or a total of $3,300 for each lot, or a little more than 1.2% of the total sales price. In consideration of receiving that payment, the Borough of Trappe would inspect the construction of the residence to assure compliance with the building, plumbing and electric codes of the municipality, allow and inspect the connection to the public water system, and assure a public water supply to each residence.

The developer has received each and every permit that it has applied for.

No permit has been denied. There has been no contention that the fees have precluded the developer from construction of the single-family residences.

Of the aforesaid fees, $1,500 is applicable to a capital contribution to the Collegeville-Trappe Joint Water System on the capital cost of constructing wells and maintaining a potable water supply. During the review process, the developer and its attorney were apprised that a study had been made by an engineering firm on behalf of the Collegeville-Trappe Joint Water System of the need to develop five potential wellsites within the Boroughs of Collegeville and Trappe for water supplies. The study further revealed that there was a need to develop the additional water resources to supply water for new developments in the

Borough and that the Borough was concerned about having the requisite margin in case of drought and for fire (R.826a-828a).

The Collegeville-Trappe Joint Water System is operated by the adjoining Boroughs of Collegeville and Trappe. The Joint Water System has functioned on a marginal yield for the past six to eight years. Under drought conditions, the impact of additional users will affect the ability of the municipality to supply water to all its residents (R.942a). The $1,500 capital contribution fee is for the construction of additional facilities which are needed for additional water supplies in the Borough (R.946a). A new well will supply approximately 330 new homes (R.940a-942a). The Delaware River Basin Commission, however, allows a municipality only to use 2/3 of the

sustainable yield of a well (R.943a). Thus, one municipal well will actually serve only 200 residences. The cost of a well is between $180,000 to $250,000 (R.955a-956a). That cost does not include the cost to treat the water if there is a water quality problem. An air stripper can cost an additional $100,000 and all new wells in the Borough have been using air strippers (R.956a). The overall cost for constructing a new well and putting it into service would be approximately $400,000 to $500,000 (R.954a). Accordingly, the potential EDU capital contribution for each residence would be $2,000 to $2,500 ($400,000 or $500,000 divided by 200 residences). The capital contribution required by the Joint Water System is only $1,500.

The Borough, through the Joint Water System, also charged a $700

tapping fee for the connection of a residence to the public water system. "Tapping" involves laying the main, installing hydrants and valves, and tapping into the existent pipe. It involves hydraulic consideration. The Joint Water System bears the cost and risk of an improper design. Where possible, the system endeavors to have loops to avoid a dead end in the system. Dead ends create stagnant water, resulting in bacterial problems and water quality considerations. The design of the Trappe Meadow System has a dead end, and the system will have to deal with that problems and rectify the same in the future at its own cost and expense (R.957a-961a).

Tapping services performed for the developer by the system include review and design of the system that is being installed, inspection of the

installation of pipe in the taps, installation of the water meter and the outside remote meter reader, and instructions to the contractor on the design and installation of the water main, fire hydrants and other component parts for the water system for the development (R.944a).

The Borough of Trappe employs a building inspector at a salary of $200 a week. Occasionally, the building inspector uses an outside architect for dealing with BOCA Code questions (R.915a-918a). The building inspector consults with the Borough Solicitor as well as the Borough Engineer (R.919a, 925a). A substantial portion of the Borough Secretary's work is related to building permit administration (R.28a). Also, a substantial portion of the Treasurer's time is engaged in the administration of building permits. The

expense of regulating building permits within the Borough of Trappe involves a portion of the telephone expenses, costs for running and operating the Borough Hall, insurance costs, copy machine expenses, office supplies, a portion of the Solicitor's fees and Engineer's fees, postage, a portion of the Treasurer's salary, a portion of the Treasurer's bond, and a portion of the Code Enforcement Officer's salary in addition to the salary of the Building Inspector (R.928a-929a, 932a).

The Borough of Trappe made a review of the costs and expenses related to the administration and supervision of the building permit ordinance. That analysis revealed that basically all the building fees were used for the administration and supervision of the building permit ordinance. The analysis also revealed that during a period of

little building in the Borough of Trappe, the Borough expends substantial monies from the general fund to supplement the fees received in order to cover costs for the administration and supervision of the building permit ordinance. Since most of the costs associated with the administration of the building permit ordinance are fixed costs, a substantial portion of the costs are incurred by the Borough regardless of the development within the municipality (R.796a-798a).

SUMMARY OF ARGUMENT

This Court has long recognized that where there is a "taking claim" made under the Fifth Amendment, the property owner has to exhaust the state remedies for just compensation. That rule is applicable regardless of whether the taking is by regulatory action or physical possession. The cases cited by

the petitioners to suggest that there is a split in the circuits on this issue do not hold that a property owner need not exhaust the state remedies for just compensation before seeking relief in federal court. The rationale for the rule requiring exhaustion is equally applicable to the possessory taking cases as for the regulatory taking cases. No novel issue is, thus, presented and the Petition should be denied.

The district court used the proper test in determing whether the ordinance of the Borough of Trappe denied the petitioners' substantive due process rights. The lower court used the rationally related test as required by numerous decisions of this Court. The petitioners improperly seek a review of the standard to be applied in this case since the issue was not preserved in the

Court of Appeals. There is no case or controversy as to another standard to be applied. The endeavor of the petitioners to have this Court mandate that a legislative body must make certain studies before legislation can be enacted would be inappropriate and contrary to the constitutional mandate of the separation of powers of the three branches of government.

ARGUMENT

1. THE PETITION SHOULD NOT BE GRANTED SINCE THE ISSUES RAISED HAVE BEEN PREVIOUSLY ADDRESSED BY THIS COURT AND NO NOVEL ISSUE IS PRESENTED.

A. This Court Has Addressed The Issue Previously As To Whether A Property Owner Must Seek Compensation Under State Procedures Prior To Asserting A Taking Claim In The Federal Court Based Upon A Claim That A Government Regulation Unconstitutionally Restricts The Use Of Land.

In *Pennell v. City of San Jose*, 485

U.S. 1, 108 S.Ct. 849, 99 L.Ed.2d (1988), a rent control ordinance was challenged as being an unconstitutional government regulation giving rise to a taking under the Fifth Amendment. This Court declined to consider the taking claim because the ordinance provided a mechanism to impose reasonable fees and there was no showing on the record that a confiscatory rate had been in fact imposed:

> "Given the 'essentially ad hoc, factual inquir[y]' involved in the taking analysis, *Kaiser Aetna v. United States*, 444 U.S. 164, 175, 100 S.Ct. 383, 390, 62 L.Ed.2d 332 (1979), we have found it particularly important in takings cases to adhere to our admonition that 'the constitutionality of statutes ought not to be decided except in an actual factual setting that makes such a decision necessary." *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 294-295, 101 S.Ct. 2352, 2369-2370, 69 L.Ed.2d 1 (1981). In *Virginia Surface Mining*, for example, we found that a challenge to

> the Surface Mining Control and Reclamation Act of 1977, 91 Stat. 447, 30 U.S.C. §1201 et seq., was 'premature', 452 U.S., at 296, n. 37, 101 S.Ct. at 2370, n.37 and 'not ripe for judicial resolution,' *id.* at 297, 101 S.Ct., at 2371, because the property owners in that case had not identified any property that had allegedly been taken by the Act, nor had they sought administrative relief from the Act's restrictions on surface mining. Similarly, in this case we find that the mere fact that a Hearing Officer is enjoined to consider hardship to the tenant in fixing a landlord's rent, without any showing in a particular case as to the consequences of that injunction in the untimate determination of the rent, does not present a sufficiently concrete factual setting for the adjudication of the takings claim appellants raise here." *Id.* 485 U.S. at 10, 108 S.Ct. 856-7, 99 L.Ed.2d 13.

Petitioners claim that "this Court has, at least by implication, restricted the 'exhaustion of state remedies requirement' to Taking Claims based upon the denial of all economically viable use of the property and has not applied

this requirement to Taking Claims based upon the failure of governmental regulation to substantially advance a legitimate state interest." (Petition, p.10). Petitioners argue that the exhaustion requirement as set forth in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985) should not apply. Petitioners' assertion is flawed since there is not a taking unless there is a denial of a property right. The threshold issue in a taking claim is whether there was in fact a taking either by physical occupation or by regulatory action. See, e.g.: *Loretto v. Teleprompter Manhatten C.A.T.V. Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982) and *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978). To prevail in a

regulatory taking case, petitioners must first establish that the regulations, in substance, have taken a property interest. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S.Ct. 158, 160, 67 L.Ed. 322 (1922); *Kaiser Aetna v. United States*, 444 U.S. 164, 178, 100 S.Ct. 383, 392, 62 L.Ed.2d 332 (1979).

The rationale of *Williamson County Regional Planning Commission v. Hamilton Bank, supra*, is equally applicable to a regulatory taking claim. Justice Blackmun, writing for this Court, presented the rationale of first exhausting state remedies in a taking claim as follows: "A second reason the taking claim is not yet ripe is that the respondent did not seek compensation through the procedures the State has provided for doing so . . . . the Fifth Amendment does not proscribe the taking of property; it proscribes taking

without just compensation . . . . nor does the Fifth Amendment require that just compensation be paid in advance of, or contemporaneously with, the taking; all that is required is that a 'reasonable, certain and adequate provision for obtaining compensation' exists at the time of the taking." *Id.*, 473 U.S. at 194, 105 S.Ct. at 3121, 87 L.Ed.2d at 143-4.

In *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 101 S.Ct. 1287, 67 L.Ed.2d 551 (1981), a property owner claimed that the city of San Diego had taken property by a regulatory ordinance which he claimed violated the Just Compensation Clause of the Fifth Amendment. This Court concluded that it lacked jurisdiction. There, this Court reaffirmed its long-standing decision in *Grays Harbor Co. v. Coats-Fordney Co.*, 243 U.S. 251, 37

S.Ct. 295, 61 L.Ed.2d 702 (1917), holding that this Court will not review a taking claim until a decision has been rendered in the State Court concerning compensation. Until that decision has been made, this Court will not review the decision because it is not "final". This Court further stated that the requirement to exhaust state remedies in a taking case also applies to other remedies such as mandamus or declaratory judgment relief.[1]

B. There Is Not A Split Of Authority In Circuit Courts As To Whether An Owner Must First Seek Compensation Under State Procedures Before Asserting A Taking Claim In The Federal Court.

The cases presented by the

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[1] Petitioners have filed a petition for the appointment of a jury of view styled In Re: Trappe Meadows, Trappe Meadows, Inc. Petitioner, in the Court of Common Pleas of Montgomery County, Pennsylvania, as of No. 92-01500. The issue as to whether in fact there is a taking is presently being litigated through the state court.

petitioners in support of the proposition that there is a split of authority among the circuit courts in whether the property owner must first seek compensation under State procedures before asserting a taking claim, do not support petitioners' assertions.

The holding in the case of *Commercial Builders of Northern California v. City of Sacramento*, 941 F.2d 872 (9th Cir. 1991) does not establish that a property owner must first seek compensation under State procedures before asserting a taking claim in the Federal Court. Nor does the dicta in that case so support such proposition. The Ninth Circuit dismissed the claim of the developers in that case since no taking was found. Obviously, if there was no taking, there was no necessity for the property owner to seek compensation under State

procedures.

In *Leroy Land Development v. Tahoe Regional Planning Commission*, 939 F.2d 696 (9th Cir. 1991), the court again found that there was no taking since the obligation under a settlement agreement with the Tahoe Regional Planning Commission precluded an assertion of a taking. Again, neither the holding nor the dicta in the *Leroy Land Development* case supports the proposition that an owner need not seek compensation under State procedures before asserting a taking claim in the Federal court. On the contrary, the court found no merit whatsoever in the claims, and accordingly, dismissed the same.[2]

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[2] In *Leroy Land Development v. Tahoe Regional Planning Agency, supra*, the court held that the developer could not assert a "taking" under the Fifth Amendment where it had reached an agreement with the Regional Planning Authority. In this case, Trappe Meadow, Inc., had entered into a development agreement wherein it agreed to pay $25,000 for a well site and to adhere to all of the Borough ordinances.

In *Esposito v. California Coastal Council*, 939 F.2d 165 (4th Cir. 1991), the court dismissed the due process claim stating as follows:

> "In light of the plaintiffs' continued use of the property precisely as they used it prior to the passage of the Act, we are of opinion that the *Esposito* plaintiffs have not established that the regulation in question was 'so onerous that it [had] the same effect as an appropriation of the property through eminent domain or physical possession.'" *Id.* at 170.

Noteworthy is the fact that the *Esposito* court cited *Williamson Planning Commission v. Hamilton Bank, supra.* *Williamson* clearly requires an exhaustion of state condemnation proceedings before a taking claim is ripe for adjudication in the Federal Courts.

Nor does the case of *W.J. (Jack) Jones Insurance Trust v. City of Fort Smith, Arkansas*, 731 F.Supp. 912 (W.D.

Ark. 1990) support petitioners' proposition. That decision by the District Court for the Western District of Arkansas does not necessarily reflect the law of the Eighth Circuit. In that case, an injunction was sought from a denial of a building permit on a claim that the denial of the permit would constitute a "taking" in violation of the Fifth Amendment. Unlike the case sub juris, just compensation and damages were not sought.

It is submitted that petitioners misread the law applicable to this case. Where a "taking" has been asserted, and damages are sought, this Court and the circuit courts have consistently held that the "taking" claims are not ripe for adjudication until the state court condemnation proceedings have been exhausted. The rationale for the rule is that the Fifth Amendment prohibits a

taking without just compensation. In those cases where the district court or the circuit court has decided to make a finding that there was not a "taking" as a matter of law, the case was dismissed and there was no necessity to seek just compensation through the state courts. Similarly, where just compensation was not sought, as in the *W.J. (Jack) Jones Insurance Trust* case, the court dealt with the merits of the claim. The rationale for the rule does not apply where an injunction is sought as the sole remedy.

2. THE PETITION SHOULD NOT BE GRANTED SINCE THERE IS NO NEED TO CLARIFY THE STANDARD FOR DETERMINING WHETHER GOVERNMENTAL ACTION CONSTITUTES A VIOLATION OF SUBSTANTIVE DUE PROCESS.

A. The Standard Applied In This Case Is Well Within The Standard Enunciated By This Court In Its Prior Decisions.

Petitioners assert that this Court

should review the different standards that purportedly have been applied by other courts in determining whether there has been a violation of substantive due process. However, this case does not present the issue as to what standard should be applied in a substantive due process claim since the lower court clearly applied the standard as promulgated by this Court.

The standard applied by the Court in determining whether the Borough of Trappe ordinances impaired substantive due process rights of the petitioners was "whether the law is rationally related to a legitimate state interest." See Petition, A.21-23. Accordingly, the issue presented by the petitioners in this case is not viable in the context of a case in controversy since the appropriate standard was applied in this case. Thus, the issue is not

reviewable.

B. The Appropriate Standard Was Used By The Lower Court In This Case And No Further Pronouncement Is Necessary On The Rational Relation Standard Used.

In *Williamson v. Lee Optical Co.*, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955), this Court stated: "But the law need not be in every respect logically consistent with its aim to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the peculiar legislative measure was a rational way to correct it." Unless an ordinance is found to be "clearly arbitrary and unreasonable, having no substantial relationship to the public health, safety, welfare or general welfare" its validity will be sustained. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395, 47 S.Ct. 114, 71

L.Ed. 303 (1926).

A facial challenge to the authority of the municipality to promulgate a regulation is difficult to sustain. Not only is there a presumption of constitutionality and validity, but also the facial challenge is "the most difficult challenge to mount successfully, since the challenge must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). In that respect, "the court will not scrutinize [ordinance] provisions sentence by sentence" to ascertain the validity of a particular provision that has not been applied. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. at 395, 47 S.Ct. at 121, 71 L.Ed. at 314.

Clearly, this Court has refused to

encroach upon the legislative main as to the method by which it deliberates and renders its decisions. A substantive due process challenge must, by its nature, establish that the effect of the legislative enactment denies constitutionally protected rights. It would be inappropriate for this Court to determine that a legislative enactment is unconstitutional, although it has a substantial relationship to the public health, safety, and general welfare merely because the legislators, in their sole discretion and wisdom, decided not to make an analysis of socioeconomic conditions. To so hold would make the courts super legislative bodies. The very concept of separation of powers would be abridged and no longer have any meaning or effect, since the courts would determine the means and manner by which legislation could be enacted. As

stated in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 242-3, 104 S.Ct. 2321, 2330, 81 L.Ed.2d 186 (1984):

> "Of course, this Act, like any other, may not be successful in achieving its intended goals. But 'whether *in fact* the provision will accomplish its objectives is not the question: the [constitutional requirement] is satisfied if . . . the . . .[state] Legislature *rationally could have believed* that the [Act] would promote its objective.' *Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 671-672, 68 L.Ed.2d 514, 101 S.Ct. 2070 (1981); see also *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466, 66 L.Ed.2d 659, 101 S.Ct. 715 (1981); *Vance v. Bradley*, 440 U.S. 93, 112, 59 L.Ed.2d 171, 99 S.Ct. 939 (1979). When the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings - no less than debates over the wisdom of other kinds of socioeconomic legislation - are not to be carried out in the federal courts."

CONCLUSION

It is respectfully submitted that

the petition for writ of certiorari should not be granted because:

(1) Homebuilders Association of Bucks/Montgomery Counties, Inc. and Trappe Meadows, Inc., petitioners, have no standing in this Court.

(2) The facts in this case do not raise the "taking" claims as asserted by the petitioners.

(3) This Court has decided the issues presented by the petitioners and no novel issue is presented by the facts of this case.

(4) The substantive due process issues have not been properly preserved.

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Dated: March 24, 1992